Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of Montclair Communications, Inc. (Assignor) and Waterman Broadcasting Corporation of Florida (Assignee) For Consent to Transfer Control of Montclair Communications, Inc., Licensee of WZVN-TV Naples, FL	)))))))))))))))))	 File No. BTCCT-20011121AAY Facility ID No. 19183

MEMORANDUM OPINION AND ORDER

Adopted: April 23, 2007 **Released: April 24, 2007**

By the Chief, Media Bureau:

I. INTRODUCTION

1. The Commission, by the Chief, Media Bureau, has before it a Joint Petition for Clarification of the Record and Reconsideration (Joint Petition) filed in response to the staff's August 8, 2002 dismissal of an application to transfer control of Montclair Communications, Inc., licensee of WZVN-TV, Naples, FL, from Lara Kunkler to Waterman Broadcasting Corporation of Florida, licensee of WBBH-TV, Ft. Myers, FL.[1] In dismissing the application, the staff also denied a request for waiver of the local television multiple ownership rule to permit common ownership of WZVN-TV and WBBH-TV.[2] Fort Myers Broadcasting Company (FMBC), which filed a Petition to Deny the original application, has filed an Opposition, to which Waterman and Montclair (Joint Petitioners) filed a Joint Reply.[3] Based on the information presented, we affirm the August 8, 2002, dismissal. We further conclude that the Joint Petitioners' showing does not meet the criteria for a failing station waiver of the local television multiple ownership rule, and that the Joint Petitioners have otherwise failed to demonstrate that waiver of the rule would be in the public interest.

[1] *Letter from Barbara A. Kreisman to Roy R. Russo, Esq., and Joseph A. Belisle, Esq.*, dated August 8, 2002 ("Dismissal Letter").

[2] We will exercise our discretion to consider facts raised in the Joint Petition that were not originally raised in the transfer of control application. See 47 C.F.R. § 1.106(c)(2).

[3] FMBC filed comments in response to the Joint Reply on November 25, 2002. We have considered all of the pleadings in reaching our decision.

II. BACKGROUND

2. Waterman entered into a Local Marketing Agreement (LMA) with a previous licensee of WZVN-TV on June 1, 1994, with Montclair becoming the licensee and assuming the brokered station's rights under the LMA on October 10, 1996. Though attributable under the current standard,[4] Montclair and Waterman entered into the LMA prior to November 5, 1996 and thus the LMA is grandfathered until the conclusion of the 2004 Biennial Review.[5] Waterman's acquisition of WZVN-TV, however, would violate the local television multiple ownership rule since (1) WZVN-TV and WBBH-TV have overlapping Grade B contours; (2) both stations are located within the same Naples-Fort Myers Designated Market Area (DMA); and (3) the Naples-Fort Myers DMA would contain fewer than eight independently owned and operating commercial and noncommercial television voices post-merger.[6] Common ownership of the stations would violate the local television ownership rule even if it complied with the voice count prong of the local television ownership rule since both WZVN-TV and WBBH-TV, as NBC and ABC affiliates, respectively, ranked within the top four in the DMA in terms of audience share.[7]

3. To permit common ownership, Waterman requested a presumptive waiver of the local television ownership rule under the failing station waiver standard.[8] In the Dismissal Letter, however, the staff concluded that Waterman's showing failed to comply with any of the applicable prongs of the failing station waiver standard. The staff further concluded that the asserted public interest benefits were unsupported and, thus, Waterman's showing did not otherwise justify a waiver. The staff, in particular, found that Waterman failed to "provide specific evidence that WZVN-TV has suffered low audience share

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[4] LMAs are generally attributable to the brokering station unless the LMA covers no more than 15% of the weekly broadcast hours of the brokered station. *Review of the Commission's Regulations Governing Attribution of Broadcast Interests (Attribution Order)*, 14 FCC Rcd 12559, 12597 (1999) (subsequent history omitted)

[5] *Review of the Commission's Regulations Governing Broadcasting ("Television Ownership Order")*, 14 FCC Rcd 12903, 12961 (1999) (subsequent history omitted). Section 202(h) of the Telecommunications Act of 1996 ("1996 Act") was subsequently amended on January 22, 2004, modifying the biennial review requirement of the 1996 Act to a quadrennial review requirement. The Commission initiated its quadrennial regulatory review on July 24, 2006. *In the Matter of 2006 Quadrennial Regulatory Review*, Further Notice of Proposed Rulemaking, 21 FCC Rcd 8834 (2006). Given the intervening change in the 1996 Act, the Commission has requested comment as to whether grandfathered LMAs should be reevaluated as part of the 2006 quadrennial regulatory review. *See In the Matter of Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, Report and Order and Notice of Proposed Rulemaking, 19 FCC Rcd 15238, 15244-15245 (2004) (subsequent history omitted). Grandfathering relief for those LMAs entered into prior to November 5, 1996, thus remains in effect.

[6] Under the Commission's local television multiple ownership rule, an entity may own, operate or control two television stations licensed in the same Designated Market Area (DMA) (as determined by Nielsen Media Research) if: (1) the Grade B contours of the stations do not overlap; or (2) if at least one of the stations is not ranked among the top four stations in the DMA in terms of audience share and eight or more independently owned and operating commercial and noncommercial television stations will be licensed in the DMA post-merger. 47 C.F.R. § 73.3555(b). On July 2, 2003, the Commission issued its 2002 *Biennial Review Order*, in which it modified the broadcast television multiple ownership rule. *See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunication Act of 2002* ("*2002 Biennial Review Order*"), 18 FCC Rcd 13620 (2002), *aff'd in part and remanded in part*, *Prometheus Radio Project et al. v. FCC*, 373 F.3d 372 (3d Cir. 2004), *stay modified on rehearing*, (3d Cir. Sept. 3, 2004). The U.S. Court of Appeals for the Third Circuit has stayed the modified television multiple ownership rule, which stay remains outstanding. *Prometheus Radio Project v. Federal Communications Commission*, No. 03-3388 (3d Cir. Sept. 3, 2003) (per curiam). Regardless, common ownership of WZVN-TV and WBBH-TV would not comply with the modified rule since the *Biennial Review Order* retained the prohibition on common ownership of two stations ranked within the top four in the DMA in terms audience share. *Biennial Review Order*, 18 FCC Rcd at 13691-92.

[7] See Id.

[8] Id. at Note 7.

in comparison to other stations in the market," and that Waterman's contention that WZVN-TV suffered financially was likewise unsupported. [9] The staff also stated that "the unsupported public interest showing [does not justify] grant of a waiver to Waterman," given Waterman's failure to show either an unusually small audience share or poor financial condition.[10]

III. DISCUSSION

4. The Commission entertains applications to waive the local television multiple ownership rule on a case-by-case basis where the station to be acquired is a failing station, a failed station, or an unbuilt station.[11] The Commission based the failing station waiver standard on the premise that "it makes little sense to force a station to go dark or declare bankruptcy before considering whether it should receive a waiver."[12] The Commission will generally not grant a presumptive waiver under the failing station waiver standard unless the applicant can meet *each* of the following criteria: (1) one of the merging stations has had a low all-day audience share (i.e., 4% or lower); (2) the financial condition of one of the merging stations is poor (e.g., where the station has had a negative cash flow for the previous 3 years); (3) the merger will produce tangible and verifiable public interest benefits that outweigh any harm to competition and diversity; and 4) the in-market buyer is the only reasonably available candidate willing and able to acquire the failing station, and selling the station to an out-of-market buyer would result in an artificially depressed price.[13]

5. The Commission provided guidance on what kind of showing would be necessary to meet the second prong, stating that a waiver would be more likely if the applicant could demonstrate negative cash flow for the previous 3 years.[14] The Commission, however, stated that "an applicant will need to submit data, such as detailed income statements and balance sheets, to demonstrate [financial condition]," and that the Commission will evaluate the showing by "comparing data regarding the station's expenses to industry averages."[15] The Commission stated that an applicant may base its waiver showing on circumstances existing just prior to entering into the LMA, if the LMA were entered into prior to August 5, 1999, the date the new multiple ownership rules were adopted.[16] In such instances, the waiver applicant need not meet the last prong.[17] If the showing fails to meet the presumptive criteria, then a waiver may still be granted under our *ad hoc* public interest standard.[18]

6. **Audience Share.** The Joint Petitioners acknowledge that WZVN-TV's all-day audience share never dropped below 4%. The Joint Petitioners, rather, contend that audience share is an inadequate measure of financial condition in this case, arguing that the Commission "never intended its 4%

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[9] Dismissal Letter at 2-3.

[10] Id. at 3.

[11] 47 C.F.R. § 73.3555, Note 7.

[12] *Television Ownership Order*, 14 FCC Rcd at 12939.

[13] 47 C.F.R. § 73.3555, Note 7. *Television Ownership Order,* 14 FCC Rcd at 12939.

[14] *Television Ownership Order*, 14 FCC Rcd at 12939.

[15] *Id.*

[16] *Id.* at 12965.

[17] *Television Ownership Order,* Memorandum Opinion and Second Order on Reconsideration, 16 FCC Rcd 1067, 1077 (2001).

[18] *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (the Commission may waive a rule if application will not undermine the policy behind the rule, the policy already having been determined to be in the public interest).

benchmark to operate as an ironclad indicator" of whether a station is failing.[19] The Joint Petitioners point out that WZVN-TV's audience share was low for an ABC affiliate with a local news presence in the market. The Joint Petitioners state that WZVN-TV's 9 a.m. – 12 midnight daypart share across all sweeps periods from July 1992 to July 1994 ranged from 9% to 13%, whereas the CBS and NBC affiliates' daypart shares ranged from 22% to 37% and 18% to 24%, respectively, during the same period.[20] The Joint Petitioners argue that the audience share data was particularly weak for the 6 p.m. to 8 p.m. time period, during which stations usually present their main newscasts, and which accounts for a disproportionately large share of a station's revenues.[21]

7. FMBC argues that the Joint Petitioners' request that they be permitted to own two of the top four stations in a market with less than eight independent voices would be tantamount to repeal of the local television multiple ownership rule.[22] FMBC points out that WZVN-TV's lowest quarterly all-day audience share for the two years prior to entering into the LMA was 9%, more than twice the threshold set forth in the *Television Ownership Order*.[23] FMBC states that, for the 8 quarters prior to entering into the LMA, WZVN-TV's overall audience share was better than the audience share achieved by Waterman's operation of the station in 2001.[24]

8. We agree that the Joint Petitioners have failed to demonstrate that granting the waiver would be consistent with the audience share component of the failing station waiver standard. As noted above, the proposed combination would include both an NBC and an ABC affiliate. The disappointing audience share figures cited by the Joint Petitioners fail to demonstrate that WZVN-TV's audience share was so low as to place the station in danger of going dark. The Commission specifically stated in the *Television Ownership Order* that failing stations "rarely have the resources to provide local news programming, and often struggle to provide significant local programming at all."[25] Despite the Joint Petitioners' argument that WZVN-TV's ratings were particularly weak during the 6 p.m. – 8 p.m. time period, WZVN-TV, even prior to being brokered by Waterman, had the resources to produce its own local news programming.

9. **Financial Condition.** The Joint Petitioners further argue that WZVN-TV (then WEVU-TV) was suffering financially for the relevant three years prior to entering into the LMA on June 1, 1994, due, primarily, to the station's disadvantageous competitive position.[26] The Joint Petitioners state, in particular, that WZVN-TV's tower, being located in the southern portion of the DMA, failed to provide a strong enough signal to the DMA's northernmost population centers. The Joint Petitioners argue that the presence of WWSB-TV, a fellow ABC affiliate located in the neighboring Sarasota, FL DMA,

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[19] *Joint Petition* at 13.

[20] *Id*.

[21] *Id.* at 13-14.

[22] *Opposition to Joint Petition* at 1.

[23] *Id.* at 3.

[24] *Id.* at 7.

[25] *Television Ownership Order*, 14 FCC Rcd 12939.

[26] The Joint Petitioners make no showing with respect to the financial condition of the WZVN-TV after entering into the LMA. To support their financial showing, the Joint Petitioners have filed the declarations of Bernard Waterman, President of Waterman Broadcasting; Steven Pontius, Former General Manger of WBBH-TV and Executive Vice-President of Waterman Broadcasting; Lara Kunkler, President and Owner of Montclair; U. Bertram Ellis, Jr., President, CEO and Chairman of the Board of Ellis Communications, Inc.; and Arthur H. Miller, a certified public accountant and tax attorney.

exacerbated WZVN-TV's competitive disadvantage since it provided a stronger signal to the northern counties.

10. The Joint Petitioners also argue that the station needed substantial capital improvements in order to compete, improvements that had been postponed due to the fact that WZVN-TV had three owners prior to June 1994. The consequence of deferring capital expenditures, according to the Joint Petitioners, was a "lower quality of on-air product, disruptive power outages, failure of tapes to play on air, failure to provide breaking news or live news coverage, less news coverage for distant parts of the market, and tenuous prospects for the future."[27] The Joint Petitioners attempt to support this contention by submitting the declarations of two separate engineers.[28]

11. The Joint Petitioners acknowledge that WZVN-TV has experienced periods of positive cash flow during the three-year period prior to commencement of the LMA, but argue that these periods of positive cash flow do not accurately reflect the station's financial condition. They emphasize, instead, the station's sustained and mounting operating losses, and argue that the station's future funding requirements for vital capital improvements, debt service and DTV transition costs far exceeded annual cash flow. The Joint Petitioners provide audited financial statements for the calendar year ending on December 31, 1991, and for the period beginning on August 24, 1992, and ending on December 31, 1992. They also provide unaudited financial statements for the period beginning on January 1, 1992 and ending on May 31, 1992, and for certain portions of the period beginning on January 1, 1993, and ending on June 1, 1994. Arthur H. Miller, a certified public accountant and tax attorney who completed an affidavit in support of the waiver, states that "WZVN-TV could not generate sufficient income to become viable and competitive in the marketplace and, faced with the immediate need to upgrade its technical equipment, service debt, and begin the process of planning for the DTV conversion, could not have continued in operation but for the LMA."[29]

12. FMBC challenges the Joint Petitioner's depiction of the competitive and financial situation facing WZVN-TV. FMBC argues that WZVN-TV has widespread cable carriage throughout the DMA, and that, even if the station had a coverage deficit over certain portions of the DMA, the station was still able to reach the majority of households within the DMA.[30] FMBC argues that this coverage deficit will, moreover, disappear when the DTV transition is complete.[31] FMBC further maintains that the Joint Petitioners exaggerate the competitive effect of the adjacent market ABC affiliate, WWSB-TV. FMBC states that WWSB-TV only reaches the northwest corner of one county in the Ft. Myers-Naples DMA, and that WWSB-TV serves a smaller DMA than does WZVN-TV.[32] FMBC further states that WZVN-TV's technical facilities were comparable with the other UHF stations licensed to the Ft. Myers-Naples DMA.[33]

13. FMBC has also provided the declaration of Peter Girardin, CPA, who states that the station generated a positive cash flow during each period for which the Joint Petitioners supplied

[27] *Joint Petition,* at 9.

[28] See the technical exhibits of David McKelvey, Chief Engineer of WZVN-TV since 1985, and Donald Everist, a Registered Professional Engineer, attached to the Joint Petition and the Reply, respectively.

[29] Declaration of Arthur H. Miller at 11.

[30] *Opposition to Joint Petition* at 10-11.

[31] *Id.* at 11.

[32] *Id.* at 12-13.

[33] *Id.*

sufficient financial data for a cash flow computation.[34] The claim that WZVN-TV was suffering financially is also rebutted, according to FMBC, by the willingness of several buyers to pay an ever-increasing price for the station.[35] WZVN-TV was placed on the air in 1974 as an ABC affiliate, and sold on August 24, 1992, for $4.65 million. Montclair eventually acquired WZVN-TV from Elcom of Florida, Inc. in 1996 for $21 million.[36] Thus, FMBC contends that WZVN-TV appreciated over 100% in the two years before commencing the LMA, which is not indicative of a failing station.[37]

14. We agree that the Joint Petitioners have failed to demonstrate that WZVN-TV was suffering financially during the three years prior to entering into the LMA. First, the station's cash flow was both consistently and increasingly positive. Though the Joint Petitioners request that we focus on the station's mounting operating losses, and inability to invest in new equipment, the Joint Petitioners' characterization of WZVN-TV as a station facing an increasingly perilous financial situation is rebutted by the station's increasing market value (defined as what a willing buyer is willing to pay). Both facts lead us to conclude that the station was not in imminent danger of going dark during the three years prior to entering into the LMA. We therefore conclude that the Joint Petitioners have failed to show that common ownership of WZVN-TV and WBBH-TV would comply with the second prong of the failing station waiver standard.

15. **Public Interest Showing**. The Joint Petitioners argue that the LMA has resulted in the following identifiable, program-related public interest benefits: (1) an expansion of locally-produced news from 6 hours per week to approximately 19.5 hours per week; (2) a distinct local news product due to separate producers, anchors and reporters; and (3) an increase in children's educational and informational programming from 1 hour per week to 5 hours per week.[38] Though not program-related, the Joint Petitioners also contend that the LMA has provided for necessary facilities upgrades, as described above, and that the LMA has permitted an expedited transition to DTV.[39]

16. The Joint Petitioners further argue that common ownership of WZVN-TV and WBBH-TV has not posed a threat to diversity in the Ft. Myers-Naples, FL DMA, but has, in fact, increased diversity by developing WZVN-TV as a viable local voice and serious competitor in the market.[40] With respect to the competition and diversity already existing in the market, the Joint Petitioners state that the Ft. Myers-Naples market has six independently owned "voices" as defined in the Commission's rules, but that the actual number of broadcast television voices exceeds 6 when one considers (a) that WZVN-TV and WBBH-TV broadcast entirely different program services; (b) that the market is served by Class A station WEVU-LP, which is carried by the market's dominant cable system; and (c) that the two northernmost counties of the DMA are served by adjacent market ABC affiliate WWSB-TV, which produces its own local news programming.[41] In addition to broadcast television "voices," the Joint Petitioners contend that the market is also well-served by newspapers, cable systems, and broadcast radio stations.[42]

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[34] *Id.* at Exhibit 2.

[35] *Id.* at 7.

[36] *Id.* at 7-8.

[37] *Id.* at 8.

[38] *Joint Petition* at 16-17.

[39] *Id.* at 17-19.

[40] *Id.* at 20.

[41] *Id.* at 21.

[42] *Id.* at 22-23.

17. FMBC responds that, with respect to the program-related public interest benefits, more than 80 percent of the weekly children's programming is the ABC network's Saturday morning programming.[43] FMBC also argues that much of the news presented over WZVN-TV consists of a repackaged version of WBBH-TV's news, which allegation the Joint Petitioners' have denied.[44] With respect to technical upgrades, FMBC maintains that most of the broadcast equipment purchased by WZVN-TV is studio equipment used or usable by WBBH-TV, and the remainder can be sold or leased to the current licensee. FMBC further argues that the Joint Petitioners have failed to demonstrate how the Ft. Myers-Naples DMA is different from any other television market having only six "voices." Common ownership of WZVN-TV and WBBH-TV will decrease diversity, according to FMBC, by preventing the eventual separate sale of WZVN-TV to an out-of-market competitor, and will ensure an ABC/NBC combination in the market for the foreseeable future.[45]

18. We agree that granting a waiver in this instance would not be in the public interest. The Joint Petitioners have failed to demonstrate how the Ft. Myers-Naples DMA is unique among markets with six independent television voices so that common ownership of two top-four network affiliates is justified. The Ft. Myers-Naples DMA, moreover, is not a particularly small market, ranking 81 out of a total of 210 DMAs. We agree that permitting common ownership of an ABC and NBC affiliate would decrease, rather than increase, diversity by preventing sale of the station to an out-of market competitor.

19. After carefully reviewing the pleadings in this case, we also conclude that the Joint Petitioners have likewise failed to demonstrate that grant of the waiver would be justified under our *ad hoc* standard. Under *Wait Radio v. FCC*, an applicant may show that the public interest may be better served by waiver, rather than application, of a rule. Where the Commission is applying an established rule, however, "an applicant for waiver faces a high hurdle even at the starting gate."[46] The Commission has further stated that the waiver standards set forth in the *Television Ownership Order* were adopted "to ensure that waivers are available only when truly necessary."[47] As discussed above, WZVN-TV does not appear to have been in imminent danger of going dark, either before or after entering into the LMA, and WZVN-TV meets none of the prongs of the failing station waiver standard. Under these circumstances, the Joint Petitioners would need to demonstrate how their particular situation is unique, which we do not believe they have done.

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[43] *Opposition to Joint Petition*, at 13-14.

[44] *Id.* at 14.

[45] *Id.* at 14-15.

[46] *Wait Radio v. FCC*, 418 F.2d at 1157.

[47] *Television Ownership Order,* Memorandum Opinion and Second Order on Reconsideration, 16 FCC Rcd at 1076.

IV. ORDERING CLAUSES

20. Accordingly, **IT IS ORDERED**, That the Joint Petition for Clarification of the Record and Reconsideration filed jointly by Montclair Communications, Inc. and Waterman Broadcasting Corporation, **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai
Chief, Media Bureau